2005

Peterson v. Peterson : Brief of Appellant

Utah Court of Appeals

Douglas L. Neely; Attorneys for Appellee.
C. Val Morley; Witt Morley & Anderson; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

VAN O. PETERSON, Petitioner and Appellee, vs. **KORRIN PETERSON** Respondent and Appellant.	Appellate Case No. 20050472-CA District Court No. 034600189

BRIEF OF APPELLANT

APPEAL FROM THE RULING OF THE SIXTH JUDICIAL DISTRICT COURT, HON. PAUL D. LYMAN, ENTERED APRIL 22, 2005, DENYING RESPONDENT'S MOTION TO SET ASIDE DECREE OF DIVORCE

DOUGLAS L. NEELY - 6290
1st South Main, Suite 205
P.O. Box 7
Manti, Utah 84642
Attorneys for Van O. Peterson

C. VAL MORLEY - 6942
WITT MORLEY & ANDERSON, P.C.
306 West Main Street
American Fork, UT 84003
Attorneys for Korrin Peterson

PARTIES TO PROCEEDINGS

Korrin Peterson, Respondent (Appellant)	C. Val Morley WITT MORLEY & ANDERSON, P.C. Attorneys for Korrin Peterson
Van O. Peterson, Petitioner (Appellee)	Douglas L. Neeley Attorney for Van O. Peterson

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78–2a-3(2)(h).

ISSUES PRESENTED AND STANDARD OF REVIEW

All issues presented for appellate review originate from the final Ruling denying Respondent's Motion to Set Aside Decree of Divorce issued by the Honorable Paul D. Lyman of the Sixth District Judicial Court. Accordingly, all issues relating to the trial court's ruling were preserved for appeal with the Notice of Appeal.

1. **Issue No. 1:** Whether the trial court erred in denying Respondent's Motion to Set Aside the Decree of Divorce when the trial court failed to adequately consider Respondent's arguments that the default Decree of Divorce was obtained without adequate notice to Respondent and in violation of her due process rights.

   Standard of Review: Interpretation of statutes or rules of procedure is a question of law, and accordingly, the Appellate Court grants no deference to trial court's decisions, but reviews them for correctness. *See Pangea Technologies, Inc. v. Internet Promotions, Inc.*, 94 P.3d 257, 259 (Utah 2004); *see also Dipoma v. McPhie*, 29 P.3d 1225, 1227 (Utah 2001).

   Preserved for Appeal: Respondent preserved and asserted her right to appeal by timely filing a Notice of Appeal of the trial court's Ruling. (R. 249-251, attached hereto as Exhibit "A" to Respondent's Brief.)

2. **Issue No. 2:** Whether the trial court erred in denying Respondent's Motion to Set Aside the Decree of Divorce when the trial court failed to make adequate findings to support its decision.

Standard of Review: A trial court's determination will not be reversed except for abuse of discretion. *See May v. Thompson*, 677 P.2d 1109, 1110 (Utah 1984); *see also Pacer Sport and Cycle, Inc. v. Myers*, 534 P.2d 616, 617 (Utah 1975).

Preserved for Appeal: Respondent preserved and asserted her right to appeal by timely filing a Notice of Appeal of the trial court's Ruling. (R. 249-251, attached hereto as Exhibit "A" to Respondent's Brief.)

3. **Issue No. 3:** Whether the trial court erred in denying Respondent's Motion to Set Aside the Decree of Divorce when Respondent set forth sufficient grounds to set aside the default Decree of Divorce based on her mistake and excusable neglect.

Standard of Review: A trial court's denial of a Rule 60(b) motion to set aside judgment will only be reversed if the trial court abused its discretion. *See Fisher v. Bybee*, 104 P.3d 1198, 1200 (Utah 2004); *see also Lund*, 11 P.3d 277 at 280-281.

Preserved for Appeal: Respondent preserved and asserted her right to appeal by timely filing a Notice of Appeal of the trial court's Ruling. (R. 249-251, attached hereto as Exhibit "A" to Respondent's Brief.)

4. **Issue No. 4:** Whether the trial court erred in denying Respondent's Motion to Set Aside the Decree of Divorce when Respondent set forth sufficient grounds to set aside the default Decree of Divorce based on Petitioner's actions of fraud or misrepresentation regarding his willingness to enter into a divorce stipulation.

Standard of Review: A trial court's denial of a Rule 60(b) motion to set aside judgment will only be reversed if the trial court abused its discretion. *See Fisher,* 104 P.3d at 1200; *see also Lund*, 11 P.3d at 279.

Preserved for Appeal: Respondent preserved and asserted her right to appeal by timely filing a Notice of Appeal of the trial court's Ruling. (R. 249-251, attached hereto as Exhibit "A" to Respondent's Brief.)

5. **Issue No. 5:** Whether the trial court erred in denying Respondent's Motion to Set Aside the Decree of Divorce when Respondent set forth sufficient grounds to set aside the default Decree of Divorce based on of Petitioner's actions of intentional fraud or misrepresentation and intentional non-disclosures to the trial court regarding material facts relevant to the divorce action.

Standard of Review: A trial court's denial of a Rule 60(b) motion to set aside judgment will only be reversed if the trial court abused its discretion. *See Fisher,* 104 P.3d at 1200; *see also Lund*, 11 P.3d 277 at 280-281.

Preserved for Appeal: Respondent preserved and asserted her right to appeal by timely filing a Notice of Appeal of the trial court's Ruling. (R. 249-251, attached hereto as Exhibit "A" to Respondent's Brief.)

6. **Issue No. 6:** Whether the trial court erred in denying Respondent's Motion to Set Aside the Decree of Divorce when Respondent set forth sufficient grounds to set aside the default Decree of Divorce based on her prior counsel's ineffective assistance.

Standard of Review: A trial court's denial of a Rule 60(b) motion to set aside judgment will only be reversed if the trial court abused its discretion. *See Fisher,* 104 P.3d at 1200; *see also Lund*, 11 P.3d 277 at 280-281.

Preserved for Appeal: Respondent preserved and asserted her right to appeal by timely filing a Notice of Appeal of the trial court's Ruling. (R. 249-251, attached hereto as Exhibit "A" to Respondent's Brief.)

RELEVANT STATUTES/RULES

Rule 6(a) of the Utah Rules of Civil Procedure:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

Rule 6(d) of the Utah Rules of Civil Procedure:

> Notice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

Rule 6(e) of the Utah Rules of Civil Procedure:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period of after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the end of the prescribed period as calculated under subjection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period

shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

(A copy of Rule 6 of the Utah Rules of Civil Procedure is attached hereto as Exhibit "B" to Respondent's Brief.)

Rule 37(b)(2) of the Utah Rules of Civil Procedure:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . .
>
> > (C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . .

Rule 37(d) of the Utah Rules of Civil Procedure:

> If a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), (C) of Subdivision (b)(2) of this rule. . . .

(A copy of Rule 37 of the Utah Rules of Civil Procedure is attached hereto as Exhibit "C" to Respondent's Brief.)

Rule 60(b) of the Utah Rules of Civil Procedure:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

> or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(A copy of Rule 60 of the Utah Rules of Civil Procedure is attached hereto as Exhibit "D" to Respondent's Brief.)

Rule 104 of the Utah Rules of Civil Procedure:

> A party in a divorce case may apply for entry of a decree without a hearing in cases in which the opposing party fails to make a timely appearance after service of process or other appropriate notice, waives notice, stipulates to the withdrawal of the answer, or stipulates to the entry of the decree or entry of default. An affidavit in support of the decree shall accompany the application. The affidavit shall contain evidence sufficient to support necessary findings of fact and a final judgment.

(A copy of Rule 104 of the Utah Rules of Civil Procedure is attached hereto as Exhibit "E" to Respondent's Brief.)

STATEMENT OF THE CASE

A. Nature of the Case.

This divorce action was initiated by Petitioner Van O. Peterson on a Verified Complaint for Divorce filed against Respondent Korrin Peterson (R. 1-9). The Honorable Paul D. Lyman granted Petitioner's Motion for Default and Evidentiary Hearing on the basis that Respondent did not attend the Evidentiary Hearing and did not produce the requested discovery and a final Decree of Divorce was entered on December 9, 2004 (R. 132-140). Respondent's position is that the trial court erred, on numerous grounds, in not

setting aside the default Decree of Divorce in that it was entered without properly complying with due process requirements, that the trial court failed to make adequate findings to support its decision, that Respondent set forth sufficient grounds to set aside the default Decree of Divorce based on Respondent's mistake and excusable neglect, that she set forth sufficient grounds to set aside the default Decree of Divorce based on Petitioner's actions of fraud or misrepresentation regarding his willingness to enter into a divorce stipulation, that Respondent set forth sufficient grounds to set aside the default Decree of Divorce based on Petitioner's actions of intentional fraud or misrepresentation and intentional non-disclosures to the trial court regarding material facts relevant to the divorce action, and that she set forth sufficient grounds to set aside the default Decree of Divorce based on her prior counsel's ineffective assistance (R.163-172).

B. Course of Proceedings Below.

Without a hearing on Respondent's Motion to Set Aside Decree of Divorce, the Honorable Paul D. Lyman of the Sixth Judicial District Court, issued a Ruling denying Respondent's Motion to Set Aside Decree of Divorce on the basis Respondent had received sufficient notice of the Evidentiary Hearing but simply chose not appear or have counsel present (R. 247-248, a copy of the Ruling is attached hereto as Exhibit "F" to Respondent's Brief). Respondent properly and timely filed her Notice of Appeal on May 23, 2005. (R. 249; *see also* Exhibit "A".)

C. Statement of Facts.

1. Respondent Korrin Peterson and Petitioner Van O. Peterson were married on July 29, 1999, in the City of Las Vegas, County of Clark, State of Nevada (R. 153 at ¶

1; R. 176 at ¶ 3). There have been two children born as issue of this marriage, to wit: Savanna K. Peterson, born October 18, 1999; and Sydney G. Peterson, born May 22, 2002 (R. 153 at ¶ 2; R. 176 at ¶ 4).

2. During the parties' marriage and until approximately October of 2003, Respondent's role in the marriage was that of a stay-at-home mother (R. 153 at ¶ 3; R. 176 at ¶ 6). During that period of time, Respondent was the children's primary caretaker, in that she provided for their daily physical and emotional well-being, comforted them and provided love, encouragement and support when needed (R. 153 at ¶ 3; R. 176 at ¶ 6). Respondent also prepared the children's meals, and was primarily responsible to care for them when they were ill, including staying up with them, taking them to the doctor, and giving them medications as needed (R. 153 at ¶ 3; R. 176 at ¶ 6). Respondent was, and continues to be an able, competent and capable care provider for the two minor children (R. 153 at ¶ 3; R. 176 at ¶ 6).

3. On approximately December 6, 2003, Petitioner forced Respondent to leave the marital home (R. 154 at ¶ 5; R. 176 at ¶ 7). When Petitioner threw Respondent out, she was only able to take with her one suitcase full of clothes and her car and was obligated to live with a friend in Mayfield for a few days before moving to Pleasant Grove, Utah (R. 154 at ¶ 5; R. 176 at ¶ 7).

4. In addition to throwing Respondent out of the marital home, without Respondent's knowledge or permission, Petitioner secretly took cash and the credit cards from

Respondent's wallet, took her house key, and cancelled Respondent's charge account at the local gas station (R. 154 at ¶ 6; R. 176 at ¶ 7).

5. Without Respondent's knowledge or permission, Petitioner secretly and immediately withdrew almost all of the money from both of the parties' joint checking and savings accounts (R. 154 at ¶ 7; R. 176 at ¶ 8). Petitioner took approximately $2,500 from the parties' joint savings account at the Gunnison Valley Bank, and between $7,000 to $9,000 from the parties' joint checking account at Zion's Bank (R. 154 at ¶ 7; R. 176 at ¶ 8). Petitioner admits that he withdrew the funds from the parties' joint checking accounts on the basis that he did not trust her. (R. 226 at ¶ 7.) Prior to this affidavit, Petitioner did not admit to Respondent or inform the trial court that he had taken the funds. Nowhere does Petitioner state that he has placed the "disputed funds" in a trust account during the resolution of this divorce action. (R. 224-229.)

6. Without Respondent's knowledge or permission, Petitioner secretly and immediately removed Respondent as a beneficiary on their medical and dental insurance plan (R. 155 at ¶ 8; R. 177 at ¶ 9). Petitioner admits he removed Respondent from his medical insurance plan. (R. 226 at ¶ 8.)

7. Without Respondent's knowledge or permission, Petitioner secretly removed her as the beneficiary of the Petitioner's life insurance policy (R. 155 at ¶ 9; R. 177 at ¶ 10). Petitioner admits that he removed Respondent as the beneficiary of his life insurance policy. (R. 226 at ¶ 8.) At the time of the separation, the policy was valued at approximately $150,000 to $170,000 (R. 155 at ¶ 9; R. 177 at ¶ 10).

8. Petitioner literally threw Respondent out of the marital home and wrongfully took and converted joint property and assets without a right or proper judicial process or Respondent's permission (R. 155 at ¶ 10; R. 177 at ¶ 11).

9. On or about December 18, 2003 Petitioner filed a Verified Complaint for Divorce (R. 1-9).

10. Respondent retained her first counsel near the end of December 2003. Respondent timely gave her first counsel all the requested information that was necessary to file a timely Answer (R. 155 at ¶ 12; R. 177 at ¶ 12).

11. Shortly after being served with Petitioner's Divorce Petition, Respondent was released from her employment at Wal-Mart because she complained to management of sexual harassment by a co-worker (R. 155 at ¶ 13; R. 177 at ¶ 13). After her wrongful release from Wal-Mart, she went to live in Pleasant Grove, Utah with her mother (R. 155 at ¶ 13; R. 177 at ¶ 13).

12. On or about January 12, 2004, Respondent commenced a part-time job at Gold's Gym making $5.50 per hour (R. 155 at ¶ 14; R. 177 at ¶ 14). Respondent maintained this job until approximately June of 2004. During this time, Respondent was also searching for better paying employment (R. 155 at ¶ 14; R. 177 at ¶ 14).

13. On January 16, 2004, Respondent's prior counsel showed up late to the Order to Show Cause Hearing, and even though Respondent had given him all the necessary information, her prior counsel was not adequately prepared to represent her best interests (R. 155 at ¶ 15; R. 178 at ¶ 15).

14. Respondent's counsel convinced Respondent to agree to allow Petitioner temporary custody of the children during the pendency of the divorce action, even though Respondent did not think it was the appropriate action or that it was in the children's best interest (R. 155 at ¶ 16; R. 178 at ¶ 16).

15. On approximately February 5, 2004, Respondent commenced a new job at Pointe Break Gas Station making $7.00 per hour (R. 155 at ¶ 17; R. 178 at ¶ 17). This was later increased to $7.50 per hour (R. 155 at ¶ 17; R. 178 at ¶ 17). Respondent, as of the date she filed her Motion to Set Aside, was working at Pointe Break Gas Station full time (R. 155 at ¶ 17; R. 178 at ¶ 17).

16. During February of 2004, Respondent would regularly call her prior counsel, sometimes even calling more than one time in a day, leaving several messages in an attempt to learn the status and disposition of her case (R. 156 at ¶ 18; R. 178 at ¶ 18). Respondent's prior counsel would not return any of her phone calls in February (R. 156 at ¶ 18; R. 178 at ¶ 18).

17. On or about February 23, 2004, Respondent was involved in a roll-over accident that totally destroyed her Ford Explorer and left Respondent severely injured (R. 156 at ¶ 19; R. 178 at ¶ 19). Petitioner does not deny that Respondent was involved in a terrible car accident or that the injuries she sustained were quite severe. (R. 224-229). The injury was severe enough to require physical therapy, which had to be postponed to a future time to allow her muscles to strengthen and because of the high degree of pain and the migraines it caused (R. 156 at ¶ 19; R. 178 at ¶ 19). Moreover, because of the injury to her left leg, side, hip and neck,

Respondent has been required to undergo substantial chiropractic treatment (R. 156 at ¶ 19; R. 178 at ¶ 19). During the first eight weeks, she had treatments approximately three times a week (R. 156 at ¶ 19; R. 178 at ¶ 19). During the next four weeks, she had treatments approximately one to two times a week (R. 156 at ¶ 19; R. 178 at ¶ 19). At the time Respondent filed her Motion to Set Aside, she was receiving treatment every two weeks (R. 156 at ¶ 19; R. 178 at ¶ 19). Her injury from the roll-over accident was so severe that she is still currently suffering from frequent headaches as well as debilitating migraines (R. 156 at ¶ 19; R. 178 at ¶ 19). At times the migraines were so severe that she is rendered incapacitated and unable to function properly for a few days (R. 156 at ¶ 19; R. 178 at ¶ 19).

18. On about March 2, 2004, Respondent had reconstructive surgery to repair a hole in her breast caused by the removal of a large lump in August of 2003 (R. 157 at ¶ 20; R. 179 at ¶ 20). Because of Respondent's destitute financial circumstances, she was unable to afford the necessary reconstructive surgery so her mother paid for the surgery (R. 157 at ¶ 20; R. 179 at ¶ 20). Respondent repaid this debt from the proceeds of the check received from the insurance company for the salvage value of her totaled Ford Explorer (R. 157 at ¶ 20; R. 179 at ¶ 20). Petitioner acknowledges that Respondent had a lump removed from her breast, but nevertheless, describes her reason for reconstructive surgery as disingenuous because he believed the lump to be "small." (R. 227 at ¶ 12.)

19. On or about March 5, 2004, Petitioner purportedly served upon Respondent, Discovery Requests (R. 34-35).

20. Respondent was overwhelmed by Petitioner's Discovery Requests and sought the assistance of her prior counsel to comply with the Discovery Requests (R. 157 at ¶ 21; R. 179 at ¶ 21). Respondent called her prior counsel on numerous occasions with respect to questions concerning Petitioner's Discovery Requests, however, Respondent's prior counsel generally ignored Respondent's calls (R. 157 at ¶ 21; R. 179 at ¶ 21).

21. In March of 2004, Respondent continued to experience considerable pain from her accident and continued to undergo regular treatment from her chiropractor (R. 157 at ¶ 22; R. 178 at ¶ 19).

22. In April of 2004, Respondent's prior counsel finally returned her numerous phone calls. During the conversation, Respondent explained to her prior counsel that she did not understand Petitioner's Discovery Requests and needed assistance to complete them (R. 157 at ¶ 24; R. 179 at ¶ 22). Her prior counsel simply told her to answer and comply with Petitioner's Discovery Requests and to return them to his office (R. 157 at ¶ 24; R. 179 at ¶ 22).

23. On or about April 20, 2004, without warning or notice and without assisting Respondent in complying with Petitioner's Discovery Request, Respondent's counsel unexpectedly withdrew as counsel while Petitioner's Discovery Requests were still pending and unanswered (R. 40-41).

24. On or about April 21, 2004, Petitioner filed a Motion to Compel Response to Discovery and for Sanctions (R. 42-43).

25. In April of 2004, Respondent continued to experience considerable pain from her roll-over accident and continued to undergo regular chiropractic therapy (R. 158 at ¶ 27; R. 178 at ¶ 19).

26. On or about May 11, 2004, Respondent called her prior counsel and again asked him for assistance in complying with Petitioner's Discovery Requests (R. 158 at ¶ 28; R. 180 at ¶ 23). At this point her prior counsel told Respondent that he was no longer her counsel, and that she was on her own (R. 158 at ¶ 28; R. 180 at ¶ 23). Prior to this conversation with her prior counsel, Respondent was not aware that he had even withdrawn as her counsel (R. 158 at ¶ 28; R. 180 at ¶ 23).

27. After Respondent's conversation with her prior attorney, Respondent attempted to obtain other counsel, however, because of her financially destitute circumstances, she was unable to afford the cost of retaining another attorney (R. 180 at ¶ 24).

28. Respondent did not receive a copy of Petitioner's Motion to Compel until after May 11, 2004 when Respondent's prior counsel finally forwarded her a copy (R. 158 at ¶ 30; R. 180 at ¶ 25).

29. In May of 2004 Respondent continued to experience considerable pain from her roll-over accident and continued to undergo regular chiropractic therapy (R. 158 at ¶ 31; R. 178 at ¶ 19).

30. On June 4, 2004 Respondent participated, via telephone, in a Scheduling Conference with Petitioner's Counsel and the trial court (R. 75).

31. After the June hearing, Petitioner and Respondent agreed to a stipulation to resolve the divorce proceeding (R. 159 at ¶ 33; R. 180 at ¶ 26).

32. On July 3, 2004, Respondent received the stipulated agreement purportedly containing the agreed to terms of the divorce stipulation (R. 159 at ¶ 34; R. 180 at ¶¶ 26, 27). Respondent signed and notarized the stipulation (R. 159 at ¶ 34; R. 180 at ¶¶ 26, 27). Petitioner admits that he sent Respondent several stipulations (R. 227 at ¶ 13).[1]

33. On about July 8, 2004, Respondent had to undergo a second reconstructive surgery in order to adequately and properly repair the hole in her breast (R. 159 at ¶ 35; R. 180 at ¶ 28).

34. In early July of 2004, Petitioner told Respondent that the stipulation she had signed was invalid unless she took the divorce education class (R. 159 at ¶ 36; R. 180 at ¶ 27). Respondent immediately called and signed up for the divorce education class at the next available time, which was held approximately August 16, 2004 (R. 159 at ¶ 36; R. 180 at ¶ 27).

35. After taking the divorce class, Respondent called Petitioner informing him that she had signed the stipulation and had taken the divorce education class (R. 159 at ¶ 37; R. 181 at ¶ 29). She then sent the notarized stipulation and divorce education certificated to Petitioner's counsel (R. 159 at ¶ 37; R. 181 at ¶ 29).

36. Shortly thereafter, Respondent called Petitioner's counsel to see if Petitioner had signed the stipulation, however, she was unable to speak with Petitioner's counsel

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[1] Petitioner incorrectly recalls the stipulation period, claiming it occurred from June through December of 2003. (*See* R. 227 at ¶ 13.) However, since Petitioner did not even file his Verified Complaint for Divorce until December 18, 2003, the stipulation period could not have occurred as claimed by Petitioner. (*See* R. 1-9.)

and was only able to leave a message for him (R. 159 at ¶ 38; R. 181 at ¶ 30). Petitioner's counsel never returned Respondent's phone call ®. 181 at ¶ 30).

37. Near the later part of August, Respondent again called Petitioner regarding the stipulation (R. 159 at ¶ 39; R. 181 at ¶ 31). Petitioner explained that he was only waiting to hear from his counsel and then he would sign the stipulation (R. 159 at ¶ 39; R. 181 at ¶ 31).

38. In early September, Respondent once again called Petitioner regarding the status of the stipulation (R. 159 at ¶ 40; R. 181 at ¶ 32). Again Petitioner told Respondent that he was only waiting to get the stipulation from his counsel (R. 159 at ¶ 40; R. 181 at ¶ 32). Petitioner assured Respondent that he would contact his counsel regarding the stipulation (R. 159 at ¶ 40; R. 181 at ¶ 32).

39. On or about September 7, 2004, Petitioner purportedly filed a Motion for Default and Evidentiary Hearing (R. 83-86).

40. Petitioner purportedly both filed with the trial court and sent to Respondent a Notice to Submit for Decision Petitioner's Motion for Default and Evidentiary Hearing on September 17, 2004 (R. 87-89; R. 90-91; R. 160 at ¶ 42).

41. The Notice of Evidentiary Hearing was purportedly sent by the trial court to Respondent on September 17, 2004, only 7 days prior to the Evidentiary Hearing (R. 90-91).

42. Respondent never received a copy of the Motion for Default and Evidentiary Hearing, the Notice to Submit or Notice of the Evidentiary Hearing (R. 160 at ¶ 44; R. 181 at ¶ 33).

43. The Evidentiary Hearing took place on September 24, 2004 (R. 92).

44. At the Evidentiary Hearing, Petitioner's counsel proffered inaccurate evidence, namely (R. 192-195, a copy of this Transcript is attached hereto as Exhibit "G"):

a. That since December of 2003, Respondent has had breast *augmentation* surgery and received *several* tattoos, implying that because she had the ability to pay for these items she must be making a good living from her employment (R. 192; Exhibit "G"). This characterization is inaccurate and places Respondent in a false, negative light. As stated above, the primary purpose of the surgery was not augmentation, but reconstruction – which required two surgeries to complete (R. 161 at ¶ 48a; R. 182 at ¶ 37). Moreover, despite the need for the reconstructive surgery, the only reason she was able to have the surgery is because her mother assisted with the financing (R. 161 at ¶ 48a; R. 182 at ¶ 37). Additionally, the tattoo she received was done without charge by her brother (R. 161 at ¶ 48a; R. 182 at ¶ 37).

b. Petitioner requested to have Respondent's wage imputed at $9.00 per hour (R. 192; Exhibit "G"). This is untrue. As stated previously, at the time of the Evidentiary Hearing, she was only making $7.50 per hour working full time at Pointe Break Gas Station (R. 161 at ¶ 48b; R. 178 at ¶ 17).

c. Petitioner claimed that Respondent was working as a bartender (R. 192; Exhibit "G"). This is untrue. Respondent has never worked as a bartender (R. 161 at ¶ 48c; R. 182 at ¶ 38).

d. Petitioner represented that Respondent was fired from Wal-Mart because of an affair she was having with her boss (R. 192; Exhibit "G"). This is untrue. Respondent was wrongfully released from Wal-Mart because she reported sexual harassment by a co-worker to management (R. 161 at ¶ 48d; R. 177 at ¶ 13).

e. Petitioner represented that the real property was premarital property (R. 192; Exhibit "G"). This is untrue. Prior to the parties' marriage, Petitioner secured a mortgage on the marital home in the amount of approximately $110,000 (R. 161 at ¶ 48e). For the 4 ½ years prior to the parties' separation, Respondent helped contribute to the approximately $800.00 per month mortgage (R. 161 at ¶ 48e; R. 176 at ¶ 3). Respondent has an interest in the equity she contributed to the marital home during the parties' marriage (R. 161 at ¶ 48e). In Petitioner's affidavit, he does not deny that Respondent has an equitable interest in the martial home and does not try to explain or reconcile his statement at the Evidentiary Hearing (that the home was premarital) with the actuality of the parties' situation (that Respondent has an equitable interest in the home). (R. 224-229.)

45. On approximately September 26, 2004 Respondent called Petitioner again regarding the status of the stipulation (R. 160 at ¶ 46; R. 181 at ¶ 34). This time Petitioner openly mocked and laughed at her telling, her that she was "so f_ _ _ ing stupid!" and that "I just got everything." (R. 160 at ¶ 46; R. 181 at ¶ 34.) Petitioner never denies making these statements to Respondent. (R. 224-229.)

After this conversation, Respondent realized, for the first time, that Petitioner had purposefully deceived her, that he did not intend to honor the stipulation that the parties had previously agreed to, and that he obtained an unfair advantage in the divorce proceeding through deceit and subterfuge (R. 160 at ¶ 46; R. 181 at ¶ 34). After Respondent's conversation with Petitioner, she once again began looking for an attorney to represent her in the divorce proceeding (R. 181 at ¶ 34).

46. Respondent hired present counsel on or about September 28, 2004 and Respondent's present counsel faxed and mailed to the trial court and Petitioner's counsel a Notice of Appearance of Counsel on September 28, 2004 (R. 93-94).

47. Respondent was completely unaware of the Evidentiary Hearing scheduled on September 24, 2004 until her present counsel informed her the hearing had already taken place (R. 162 at ¶ 49; R. 182 at ¶ 35).

48. Respondent is not legally trained or well educated. Respondent admittedly failed to respond to Petitioner's Discovery Requests (R. 162 at ¶ 50; R. 182 at ¶ 36). However, Respondent was unaware that a failure to respond to his Discovery Requests could result in a sanction of a Default Judgment against her when she had previously filed an Answer to his Divorce Petition (R. 162 at ¶ 50; R. 182 at ¶ 36).

49. On December 7, 2004, a default Decree of Divorce was ordered by the trial court as a sanction to Respondent's failure to comply with Petitioner's Discovery Requests (R. 132-140).

50. On March 4, 2005, Respondent timely filed a Motion to Set Aside the Decree of Divorce and a Memorandum of Points and Authorities in Support of the Motion to

Set Aside the Decree of Divorce. Attached to the Memorandum was Respondent's Affidavit, and several other supporting documents (R. 151-152; R. 153-195).

51. On April 21, 2005, the Honorable Paul D. Lyman issued a Ruling denying Respondent's Motion to Set Aside the Decree of Divorce (R. 247-248).

SUMMARY OF ARGUMENT

Respondent's appeal is based upon six errors attributed to the trial court's Ruling denying Respondent's Motion to Set Aside Decree of Divorce (hereinafter Respondent's "Motion to Set Aside").

First, Respondent argues that the that the trial court erred in denying Respondent's Motion to Set Aside because it was entered without properly complying with due process requirements. Pursuant to the Rule 6(d) and (e) of the Utah Rules of Civil Procedure, Respondent is entitled to five days of effective notice of the Evidentiary Hearing, exclusive of weekends and holidays. Respondent's due process rights were violated because she only received two days of effective notice of the Evidentiary Hearing.

Second, Respondent argues that the that the trial court erred in denying Respondent's Motion to Set Aside because it was entered by the trial court without the trial court making adequate findings to support its decision. Motions to set aside judgments are normally reviewed under the "abuse of discretion" standard. However, the trial court is required to make "adequate" findings of fact and conclusions of law in making its decision. In this case, the trial court abused its discretion in not making sufficient findings because it made no findings whatsoever regarding Respondent's claims of mistake and excusable neglect, fraud and ineffective assistance of counsel.

Third, Respondent argues that the that the trial court erred in denying Respondent's Motion to Set Aside because Respondent set forth sufficient grounds to set aside the default Decree of Divorce based on Respondent's mistake and excusable neglect. Motions to set aside judgments are normally reviewed under the "abuse of discretion" standard. However, Respondent submitted credible evidence, that was largely uncontested, of the surrounding circumstances which adequately support her claims of mistake and excusable neglect. In denying Respondent's Motion to Set Aside under these circumstances, the trial court abused its discretion.

Fourth, Respondent argues that the that the trial court erred in denying Respondent's Motion to Set Aside because Respondent set forth sufficient grounds to set aside the default Decree of Divorce based on Petitioner's actions of fraud or misrepresentation regarding his willingness to enter into a divorce stipulation. Motions to set aside judgments are normally reviewed under the "abuse of discretion" standard. However, Respondent submitted credible evidence, that was largely uncontested, of the surrounding circumstances which adequately support her claims that Petitioner committed fraud with respect to Respondent. In denying Respondent's Motion to Set Aside under these circumstances, the trial court abused its discretion.

Fifth, Respondent argues that the that the trial court erred in denying Respondent's Motion to Set Aside because Respondent set forth sufficient grounds to set aside the default Decree of Divorce based on of Petitioner's actions of intentional fraud or misrepresentation and intentional non-disclosures to the trial court regarding material facts relevant to the divorce action. Motions to set aside judgments are normally

reviewed under the "abuse of discretion" standard. However, Respondent submitted credible evidence, that was largely uncontested, of the surrounding circumstances which adequately support her claims that Petitioner attempted to perpetrate a fraud upon the trial court. In denying Respondent's Motion to Set Aside under these circumstances, the trial court abused its discretion.

Finally, Respondent argues that the that the trial court erred in denying Respondent's Motion to Set Aside because Respondent set forth sufficient grounds to set aside the default Decree of Divorce based on her prior counsel's ineffective assistance. Motions to set aside judgments are normally reviewed under the "abuse of discretion" standard. However, Respondent submitted credible evidence, that was largely uncontested, of the surrounding circumstances which adequately support her claims of ineffective assistance of counsel. In denying Respondent's Motion to Set Aside under these circumstances, the trial court abused its discretion.

ARGUMENT

At the outset, it should be pointed out that all claims of error in Respondent's Appellate Brief (hereafter Respondent's "Brief") to the Court of Appeals (hereafter the "Court") originate from the trial court's Ruling denying Respondent's Motion to Set Aside. As Respondent's Motion to Set Aside was based upon Rule 60(b) of the Utah Rules of Civil Procedure, a brief review, demonstrating that all of the threshold requirements for each claim in the Rule 60(b) Motion were met, is appropriate.

Rule 60(b) of the Utah Rules of Civil Procedure governs the granting of relief from judgments and orders based on reasons other than that of a clerical mistake. The trial

court is afforded broad discretion in ruling on a motion for relief from judgment under Rule 60(b) and is reviewed under an abuse of discretion standard.[2] *See Birch v. Birch*, 771 P.2d 1114, 1117 (Utah Ct. App. 1989); *see also Franklin Covey Client Sales v. Melvin*, 2 P.3d 451, 454 (Utah Ct. App. 2000). Additionally, the scope of the appellate review of a trial court's order denying a Rule 60(b) motion is limited to "address[ing] only the propriety of denial or grant of relief." *Franklin Covey Client Sales*, 2 P.3d at 456. Rule 60(b) states, in its entirety:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Utah R. Civ. P. 60(b).

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[2] While Respondent recognizes that Rule 60(b) motions are typically reviewed under the abuse of discretion standard, because Respondent presents a legal question regarding her due process rights, the due process claim is reviewed for correctness. *See e.g.*, *Pangea Technologies, Inc.*, 94 P.3d at 259.

There are three additional requirements for relief under Rule 60(b)(6) of the Utah Rules of Civil Procedure: "[f]irst that the reason be one other than those listed in subdivisions (1) through [(5)]; second, that the reason justif[ies] relief; and third, that the motion be made within a reasonable time." *Laub v. South Cent. Utah Tel. Ass'n*, 657 P.2d 1304, 1306-1307 (Utah 1982). Additionally, Rule 60(b)(6) is not available to one who should have filed under Rule 60(b)(1) but did not. *See Richins v. Delbert Chipman & Sons*, 817 P.2d 382, 387 (Utah Ct. App. 1991); *Russell v. Martell*, 681 P.2d 1193, 1195 (Utah 1984).

In Respondent's Rule 60(b) Motion to Set Aside, Respondent raised the following Rule 60(b) grounds[3] to be set aside the Decree of Divorce: subdivision (1), a claim of mistake or excusable neglect; subdivision (3), two claims of fraud (one committed upon Respondent and one upon the trial court); and subdivision (6), any other reason justifying relief from the operation of the judgement– in this case a claim of a violation due process and a claim of ineffective assistance of counsel. (*See* R. 163-172.)[4]

Regarding the timeliness of the Rule 60(b) Motion to Set Aside, Respondent's has satisfied both the three month time limit, for subdivisions (1) and (3), and the reasonable time limit, for subdivision (6), because her Motion was timely filed before three months

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[3] All of these grounds were preserved for and raised in this appeal. (*See* Respondent's Notice of Appeal at R. 249-251; *see also* Respondent's Docketing Statement filed with this Court.)

[4] Respondent's final issue on appeal is that the trial court erred in issuing his Ruling denying Respondent's Motion to Set Aside Judgment without entered sufficient findings of facts. This issue was also preserved for and raised in this appeal. *See* Respondent's Notice of Appeal at R. 249-251; *see also* Respondent's Docketing Statement filed with this Court.

had elapsed from the trial court's entry of the Decree of Divorce.[5] Any specific Rule 60(b) requirements relevant to each individual claim or subdivision will be set forth in the body of that claim's argument.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GRANT RESPONDENT'S MOTION TO SET ASIDE, ON THE BASIS THAT RESPONDENT'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE SHE DID NOT RECEIVE ADEQUATE NOTICE OF THE EVIDENTIARY HEARING

At the outset, it should be noted that Respondent has clearly met the Rule 60(b) threshold inquiry for bringing her due process claim under Rule 60(b). First, Respondent's claim of lack of due process is not contemplated under Rule 60(b)(1)-(5), and has been recognized to fall under the catchall provision of Rule 60(b)(6). *See In the Matter of Estate of Pepper*, 711 P.2d 261, 263 (Utah 1985)[6] (Appellant's due process ground of defective notice was analyzed under Rule 60(b)(6)); *see also Bish's Sheet Metal Co. v. Luras*, 11 Utah 2d 357, 359, 359 P.2d 21 (1961)[7] (A lack of due process of law is entitled to relief under Rule 60(b)(6)). Second, a denial of due process that results in an issuance of a default divorce would clearly justify relief from such an order. Finally, Respondent's Motion to Set Aside was filed within a reasonable time as it was

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[5] As set forth in the Record on Appeal, the Decree of Divorce was entered on December 9, 2004 and Respondent's Motion to Set Aside was entered on March 4, 2005. (*See* R. 132-140 and R. 151-152.) Thus, it is clear that Respondent's Rule 60(b) Motion was timely and properly filed.

[6] This case was decided under a prior version of Rule 60(b), where subdivision (7) provided for relief from judgment for "any other reason justifying relief from the operation of the judgment." *In the Matter of Estate of Pepper*, 711 P.2d at 263, fn 1. The language of this subdivision is now found under Rule 60(b)(6) of Utah Rules of Civil Procedure.

[7] This case was also decided under a prior version of Rule 60(b).

filed within three months of the entry of Default Judgment. Thus, all of the requirements to satisfy a threshold showing for relief under Rule 60(b)(6) were clearly met.

A. The Trial Court Committed Reversible Error In Failing to Correctly Consider Respondent's Lack of Due Process Issue.

In ruling on Respondent's Motion to Set Aside, specifically, with respect to her claim that her due process rights were violated because she did not receive timely notice of the Evidentiary Hearing, the trial court made the following statement:

> [t]he primary factual dispute in this matter revolves around whether the Respondent was sent notices regarding the [trial court's] proceedings after the [trial court's] June 4, 2004 scheduling conference. . . . She claims that after that date she received no notices. . . . This claim is not credible. . . . The [trial court] has reviewed the file and is still of the opinion . . . that the Respondent had adequate notice and chose not to appear and not to have counsel present.

(R. 247-248; Exhibit "F".) In reviewing the trial court's Ruling, it is apparent that the trial court was convinced that Respondent knew about the Evidentiary Hearing and simply chose to ignore it. (*See* R. 247-248; Exhibit "F"). However, regardless of the accuracy or veracity of the trial court's conclusion,[8] it is also very apparent and plain that the trial court's conclusion completely misses the point of Respondent's procedural due process argument. The thrust of Respondent's argument and her primary point is that her due process rights were violated because the *notice of the hearing was not sent out properly* or pursuant to the Utah Rules of Civil Procedure, and not whether she received notice of or was aware of the hearing.

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[8] Respondent has submitted a sworn affidavit that she never received a copy of the Notice of Evidentiary Hearing sent by the trial court. (*See* R. 159 at ¶ 33.)

One of the fundamental features of due process is that it "requires that notice be given to persons whose rights are to be affected." *Pangea Technologies, Inc.*, 94 P.3d at 259 (quoting *Riggins et al. v. Dist. Court of Salt Lake County et al.*, 51 P.2d 645, 660 (Utah 1935) (internal quotes omitted)). Plainly, Respondent's argument does not hinge on whether she was present at the previous June 4, 2004 hearing (where no Evidentiary Hearing date was set), whether she later actually received the trial court's notice of the hearing or even whether she was aware of the hearing. Indeed, as stated in her original accompanying memorandum to her Motion to Set Aside, regardless of whether Respondent actually received the trial court's notice of the hearing, Respondent's knowledge does not affect the *due process sufficiency* of the notice she received for the Evidentiary Hearing.

According to the trial court records, Petitioner filed with the trial court and sent Respondent the Notice to Submit on September 17, 2004. (*See* R. 87-89.) That same day, the trial court sent, by mail, a Notice of Evidentiary Hearing to Respondent advising her of the Evidentiary Hearing scheduled for September 24, 2004.[9] (*See* R. 90-91.) Rule 6 of the Utah Rules of Civil Procedure addresses the notice period for hearings and specifically sets forth the minimum period of notice required to effect proper notice:

> Notice of a hearing *shall be served not later than 5 days before* the time specified for the hearing, unless a different period is fixed by these rules or by

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[9] Respondent adamantly maintains that she never received either Petitioner's Notice to Submit or the trial court's Notice of Evidentiary Hearing. (*See* R. 160 at ¶ 44.) Again, regardless of whether Respondent actually received the Notices, the Notices violate the fundamental principles of due process because she did not receive *adequate* notice pursuant to the Utah Rules of Civil Procedure and established case law.

> order of the court. Such an order may for cause be made on ex parte application.
>
> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, *3 days shall be added to the end of the prescribed period* as calculated under section (a) [i.e., where the prescribed period of time is less than 11 days, exclusive of the mailing period, intermediate weekends and legal holidays are excluded from the computation]. . . .

Utah R. Civ. P. 6(d), (e) (emphasis added). Thus, the Utah Rules of Civil Procedure plainly *require five days of actual notice of the hearing*, exclusive of weekends, holidays and the three day mailing period.[10] In this case, in order for the notice to be procedurally adequate, the Notice of the Evidentiary Hearing would have had to have been sent by mail no later than September 14, 2004, three days earlier than the September 17, 2004 mailing or the Evidentiary Hearing would have had to have been held no sooner than September 27, 2004.[11]

Moreover, this minimum five day period of effective notice as required by due process has also been confirmed by the Utah Supreme Court. In *Mickelson v. Shelley*, the Utah Supreme Court held, that despite numerous pretrial reschedulings, that despite defendant's failure to timely appoint counsel, that despite defendant's failure to appear at the hearing and that despite notice of the hearing being mailed *eight days prior to the*

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[10] For a discussion regarding whether the trial court "fixed" a different notice period for the Evidentiary Hearing, *see infra*, Part IB.

[11] The Notice of Evidentiary Hearing was purportedly mailed out on September 17, 2004 (*see* R. 90-91), September 18th and 19th were weekend days and excluded from the five-day notice period. Once the three mailing days are also excluded, it is clear that only *two days* of effective notice were given to Respondent for the Evidentiary Hearing.

hearing, defendant's notice was procedurally defective, and therefore the trial court erred in failing to set aside judgment on this ground. 542 P.2d 740, 741-742 (Utah 1975). Accordingly, the case was remanded for a new hearing. *Mickelson*, 542 P.2d at 742. The Court reasoned as follows:

> Our Rules of Civil Procedure provide that when notice is required and is given by mailing, three extra days *must be included* in the required time. If we deduct the three days from the eight actually given, we have only a five-day notice, and when the time is less than seven days, intermediate Saturdays, Sundays and holidays must be excluded. One Saturday and one Sunday intervened . . . and so effective notice to [the defendant] was on the order of three days, which seems a bit short in view of the fact that Rule 6(d), U.R.C.P., provides for five days' notice of hearing on a written motion. While the notice of trial was not on a written motion, it is indicative of what reasonable time for a notice of a trial date might be.

Mickelson, 542 P.2d at 742 (emphasis added).[12] Pursuant to the Utah Rules of Civil Procedure, Rule 6(d) now *specifically requires five days notice of all hearing*, exclusive of the additional mailing days, weekends and holidays. In the present case, if the three mailing days are deducted from the seven days of notice given, of the four remaining days of notice, two of the days are weekend days.[13] According to the holding in *Mickelson* and

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[12] It should be noted that, while the Utah Rules of Civil Procedure have been amended since this case ruling, the five day notice requirement for hearings has not been removed. Significantly, the current version of the Utah Rules of Civil Procedure is still in conformity with *Mickelson* regarding the computation of the three day mailing period. Like *Mickelson,* Rule 6(a) currently calculates weekends and holidays that fall during the mailing period as part of the three day mailing period. *See* Utah R. Civ. P. 6(a). The only exception to this Rule is if the final mailing day (and thus the filing or notice deadline) falls upon a weekend or holiday, the next work day becomes the filing or notice deadline. *See* Utah R. Civ. P. 6(a).

[13] The Notice of Evidentiary Hearing was purportedly mailed out on September 17, 2004 (*see* R. 90-91), September 18th and 19th were weekend days and excluded from the five-day notice period. Once the three mailing days are also excluded, it is clear that only *two days* of effective notice were given to Respondent for the Evidentiary Hearing.

the Utah Rules of Civil Procedure, Respondent's effective notice period (regardless of whether she actually received said notice) is equivalent to only two days, which is insufficient when procedural due process requires at least a five day period of effective notice. Because Respondent did not have adequate notice or opportunity to participate in the Evidentiary Hearing, her due process rights have been violated. In light of such blatant procedural defects, the trial court's failure to set aside the default Decree of Divorce clearly constitutes reversible error under the "correctness" standard.[14]

B. The Trial Court Did Not "Fix" a Lesser Notice Period for the September 24, 2004 Evidentiary Hearing.

In Petitioner's Memorandum of Points and Authorities in Opposition to Respondent's Motion for Summary Disposition (hereafter "Petitioner's Summary Disposition Memorandum"[15]), filed with this Court, Petitioner argues that the trial court's failure to consider her due process arguments does not constitute "manifest error"[16] for two reasons: (1) that the trial court "fixed" a lesser notice period for the hearing; and (2)

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[14] Respondent recognizes that procedural questions are typically reviewed by the Court under the non-deferential "correctness" standard, nevertheless, Respondent maintains that the trial court's error was so blatant and so grievous as to constitute reversible error under even the more deferential "abuse of discretion" standard the Court typically utilizes to review a trial court's denial of a Rule 60(b) motion to set aside.

[15] For the Court's convenience, a copy of Petitioner's Summary Disposition Memorandum is attached hereto as Exhibit "H".

[16] "Manifest error" is the standard set forth by Rule 10(a)(2)(B) of the Utah Rules Appellate Procedure in order to grant a Motion for Summary Disposition. *See* Utah R. App. P. 10(a)(2)(B). The Utah Supreme Court has described "manifest error" as error that is "obvious." *See State v. Menzies*, 845 P.2d 220, 225 (Utah 1992); *see also TMD, Inc. v. Tax Com'n,* 103 P.3d 190, 192 (Utah Ct. App. 2004). In any event, it is Respondent's contention that the trial court's violation of Respondent's due process rights constitutes reversible error under either an "manifest error" or "correctness" standard.

that even if the trial court erred, the error was not manifest error because it was harmless.[17] Even with a cursory review of Petitioner's arguments,[18] it is apparent that Petitioner's arguments misconceive basic procedural requirements, are unfounded and without support in fact or law.[19]

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[17] *See* Exhibit "H", pp. 1-3.

[18] Petitioner generalizes Respondent's argument as claiming that the trial court failed to consider her arguments regarding due process. (*See* Exhibit "H", p. 2.) Petitioner's generalization overly-simplifies Respondent's argument. Respondent concedes that the trial court "considered" her argument (although Respondent openly questions how much "consideration" Respondent's arguments received, as the trial court ruled on the Motion to Set Aside without giving Respondent an opportunity of oral argument and without even addressing several arguments raised by Respondent, such as excusable neglect, fraud and ineffective assistance of counsel), however, Respondent's primary dispute regarding her due process claim is, despite case law and procedural law explicitly requiring five days of effective notice for any hearing, and despite the record clearly demonstrating that Respondent did not receive the requisite five days of effective notice, the trial court refused to set aside the judgment, and gave short shrift to her arguments (and also mis-characterized her arguments by making it a question of *whether* the notice was sent instead of *when* the notice was sent) by concluding that Respondent had received adequate notice of the Evidentiary Hearing. (*See* Respondent's Memorandum in Support of Motion for Summary Disposition pp. 10-16; *see also* R. 247-248; Exhibit "F".)

[19] In Petitioner's Summary Disposition Memorandum, he also requests that the Court strike the transcript (included with Respondent's Motion for Summary Disposition, Motion to Set Aside and herein as Exhibit "G") on the grounds that it was not prepared by a licensed transcriber. (*See* Exhibit "H", p. 3.) With respect to Petitioner's request to strike the transcript, while Respondent concedes the transcript was not prepared by a licensed transcriber, Petitioner's request to strike the transcript is not well founded because Petitioner has not alleged any basis to suggest that the transcript contains errors or is somehow inaccurate. Moreover, a verbatim copy of the transcript was included with Respondent's Motion to Set Aside and Petitioner, in his original response, did not object to the accuracy of the transcript nor did he ask the trial court to strike the transcript at that time. (*See* R. 191-195; R. 219-223.) Because Petitioner did not object to the introduction of the transcript at the trial court level, he is not now allowed to move to strike the transcript for the first time on appeal. *See e.g. D & L Supply v. Saurini*, 775 P.2d 420, 421 (Utah 1989) (A party's failure to object to the evidentiary sufficiency of an affidavit results in the party waiving the right to object to the admitted evidence on appeal). Finally, the admissibility of the transcript does not affect

Petitioner's primary argument regarding Respondent's due process claim is that because the trial court denied Respondent's Rule 60 Motion to Set Aside, that *ipso facto* the trial court "clearly fixed a shorter time for the Hearing." (Petitioner's Summary Disposition Memorandum, p. 2.) As support of this argument, Petitioner references the language Rule 6(d) of the Utah Rules of Civil Procedure,[20] which states, in its entirety, "[n]otice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application." Utah R. Civ. P. 60(d).

However, Petitioner's argument is completely without merit. Petitioner would have this Court believe that, somehow, the trial court's denial of Respondent's 60(b) Motion to Set Aside, *which occurred after the Evidentiary Hearing took place*, can resolve any of the prior procedural deficiencies regarding that Evidentiary Hearing, through the flawed logical conclusion that because the trial court did not correct the error when given an opportunity to do so, the trial court must not have committed an error. Indeed, such a flawed conclusion would completely eviscerate the procedural protection of the notice requirement by allowing any notice problems to be "resolved" by the court after the hearing.

Moreover, Petitioner's argument is also contrary to established case law. Petitioner has conveniently failed to consider the Utah Supreme Court ruling in

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Respondent's arguments regarding lack of due process.

[20] It is assumed that Petitioner meant to reference Rule 6(d), even though his Memorandum references Rule 69(d). (*See* Exhibit "H", p. 2.)

Mickelson[21] wherein the Utah Supreme Court reversed a trial court's refusal to set aside a judgment because the hearing notice was inadequate.[22] 542 P.2d at 741-742. Nowhere in the Utah Supreme Court's opinion does it state, that since the trial court refused to set aside a judgment from a hearing sent without proper notice, the trial court must have "fixed" a shorter time period. *Id.* In fact, the opposite is true, while the Court sympathized with the trial court's frustration in resolving the action, it held that, despite numerous pretrial reschedulings, defendant's failure to timely appoint counsel, defendant's failure to appear at the hearing and notice of the hearing being mailed *eight days prior to the hearing*, that defendant's notice was procedurally defective, and that therefore the trial court erred in failing to set aside judgment on this ground. *Id.*

More telling of the weakness of Petitioner's position is that he has not even attempted to distinguish *Mickelson* from the present case. The reason for this is, of course, quite obvious: while some of the background circumstances differ between the parties, the primary and controlling issue–that of proper procedural notice–is identical. Like *Mickelson*, Respondent simply did not receive proper or adequate notice of the Evidentiary Hearing. As such, the trial court committed reversible error in refusing to set aside the divorce.

Finally, Petitioner's argument fails because it does not conform with the specific requirements of Rule 6(d). While the trial court *can order* a different period than set forth

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[21] Forth further discussion regarding *Mickelson* and its applicability in this case, *see supra*, Part IA.

[22] That case was remanded to the trial court with directions to set aside the judgment, set a firm date for trial and give proper notice of the trial date. *Mickelson*, 542 P.2d at 742.

in the Rule 6(d), it must *actually and officially make such an order prior* to the hearing. Clearly, the trial court cannot order a different notice period *ex post facto*.[23] However, a review of a record clearly demonstrates that the trial court made no such order, either upon motion of Petitioner or *sua sponte*. It is obvious that the issue was not raised and a different time period was not ordered by the trial court prior sending out notice of the Evidentiary Hearing. Because the trial court did not order a different notice period, the Rule 6(d) notice period of five days (plus three days for mailing) for a hearing needed to be complied with strictly. Because it was not, Respondent's due process rights were violated.

C. The Trial Court Error In Failing to Adequately Consider Respondent Due Process Argument Was Not Harmless.

Petitioner then argues, that even if the trial court erred in failing to adequately consider Respondent's due process argument, the error was harmless because the Respondent was not entitled to a hearing at all. In support of his argument, Petitioner states that Petitioner was granted a default decree of divorce pursuant to Rule 104 of the Utah Rules of Civil Procedure. This Rule states:

> A party in a divorce case may apply for entry of a decree without a hearing in cases in which the opposing party fails to make a timely appearance after service of process or other appropriate notice, waives notice, stipulates to the withdrawal of an answer, or stipulated to the entry of a decree of divorce or entry of default. An affidavit in support of the decree shall accompany the application. The affidavit shall contain evidence sufficient to support necessary findings of fact and a final judgment.

Utah R. Civ. P. 104. Once again, Petitioner's argument is flawed. A review of the

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[23] To allow otherwise would render the procedural notice period completely meaningless, as the trial court could simply resolve any notice issues after the fact.

pleadings in this case conclusively demonstrates that none of the above-listed bases were present because: (1) Respondent appeared and filed an answer before the Petitioner filed for a default decreed of divorce;[24] (2) Respondent has never waived notice; and (3) Respondent never stipulated to the withdrawal of her answer or to an entry of a decree of divorce or entry of default. Accordingly, Rule 104 is completely inapplicable to the present case.

Moreover, Petitioner has somehow forgotten (even though he filed the pleading), that the default decree of divorce in this case was granted, at Petitioner's request, *as a sanction* for Respondent's failure to timely respond to Petitioner's discovery requests, and not pursuant to Rule 104 or for her failure to make an initial appearance. In fact, Petitioner filed the Motion for Default on the same pleading as his request for an Evidentiary Hearing. Petitioner was not granted his default decree of divorce until the Evidentiary Hearing was held. Therefore, because the default decree of divorce was granted on Petitioner's motion as a court-ordered sanction, a hearing, once scheduled by the trial court, was required to be noticed properly. As such, the trial court's failure to provide adequate notice was not harmless error, but instead constitutes reversible error.

II. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN FAILING TO MAKE ADEQUATE FINDINGS TO SUPPORT ITS DECISION

In addition to ignoring Respondent's procedural due process claim, the trial court abused its discretion and committed reversible error in ruling on Respondent's Motion to

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[24] While the trial court did grant a default judgement as a court-ordered discovery sanction, the trial court never ordered that Respondent's Answer be stricken in this matter. (*See* R. 82; R. 132-140.)

Set Aside, without making adequate finding of fact to support its Ruling. Generally, a trial court's denial of a Rule 60(b) motion to set aside judgment will only be reversed if the trial court abused its discretion. *See Fisher,* 104 P.3d at 1200. However, in making its determination, a trial court's discretionary ruling must be "'based on adequate findings of fact' and 'on the law.'" *Lund*, 11 P.3d at 279 (quoting *May*, 677 P.2d at 1110). The trial court's failure to base its determination on adequate findings of fact or on the law constitutes a reversible abuse of its discretion. *See May*, 667 P.2d at 1110.

While the trial court is not obligated to set forth overly-detailed findings of fact in its Ruling (*see May*, 667 P.2d at 1110), in this case, the trial court has provided virtually no findings of fact to support its determination. The trial court's sparse findings of facts consists of only two brief paragraphs and are set out herein, in their entirety:

> The primary factual dispute in this matter revolves around whether the Respondent was sent notices regarding the [trial] [c]ourt's proceedings after the [trial] [c]ourt's June 4, 2004 scheduling conference. There is no dispute that the Respondent appeared by telephone at that hearing and that she had no counsel. She claims that after that date she received no notices, even though they were all addressed as they were prior to the scheduling conference. This claim is not credible. She also claims that the parties settled the case after the scheduling conference. If the case were really settled, why didn't she simply appear at the evidentiary hearing with the signed stipulation?
>
> The [trial] [c]ourt has reviewed the file and is still of the opinion, as originally expressed in its December 7, 2004 Ruling on Respondent's Objection to Petitioner's Proposed Findings of Fact & Conclusion of Law and Decree of Divorce, that the Respondent had adequate notice and chose not to appear and not to have counsel present.

(R. 247-248; Exhibit "F".) Thus, the trial court's Ruling provides only some very limited findings of fact related to Respondent's notice of the proceedings, her claim relating to the parties' settlement and her opportunity to appear or have counsel present at the

Evidentiary Hearing.[25] (*See* R. 247-248; *see also* Exhibit "F".) However, none of these findings adequately (or even remotely) address the issues raised by Respondent relating to her claims of mistake or excusable neglect, Petitioner's fraud against Respondent, Petitioner's fraud upon the trial court or her prior counsel's ineffective assistance. *See e.g., Lund*, 11 P.3d at 279; *May*, 677 P.2d at 1110; (*see also* R. 166-172.) Instead, the trial court is disturbingly silent regarding these issues raised by Respondent. (*See* R. 247-248; *see also* Exhibit "F".)

The trial court's sparse findings of fact in its Ruling leaves this Court (and Respondent) without an adequate basis to determine the adequacy and propriety of its Ruling in light of all the grounds that Respondent raised to set aside the default Decree of Divorce. This Court cannot adequately determine if the trial court's findings support its denial of all grounds raised by Respondent when absolutely no findings are made with respect to those grounds. Accordingly, because the trial court failed to make adequate findings of fact to support its Ruling, it has committed an abuse of discretion.[26]

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[25] For a discussion regarding Respondent's procedural due process claim and the trial court's inadequate consideration of said claim, *see supra*, Part IA-IC.

[26] Respondent recognizes that, because of the lack of findings in the trial court's Ruling, one option the Court has is to simply remand this case for further findings on the issues raised by Respondent in her Motion to Set Aside. However, Respondent believes that such a step is unnecessary because issuing further findings will not resolve the procedural due process violations asserted by Respondent. As such, Respondent believes that the most appropriate and efficient action is to reverse the trial court's ruling denying Respondent's Motion to Set Aside and order a new hearing on Respondent's Motion, or in the alternative, because the due process issue asserted in Respondent's Motion to Set Aside has no disputed facts and is a legal issue (*see infra,* Part I), the Court could simply vacate the trial court's Ruling and grant Respondent's Motion to Set Aside. *See e.g., Ralph A. Badger & Co. v. Fidelity Bldg. & Loan Assn.*, 94 Ut 97, 124, 75 P.2d 669 (1938) (Where the questions presented were purely legal and no fact questions remained in issues, there was no purpose in remanding the case for retrial).

III. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN FAILING TO SET ASIDE THE DECREE OF DIVORCE BASED ON RESPONDENT'S ARGUMENT OF MISTAKE AND EXCUSABLE NEGLECT

At the outset, it should be noted that for Respondent to be relieved from a judgment under Rule 60(b)(1) she must "demonstrate not only that the judgment resulted from mistake, inadvertence, surprise, or excusable neglect, but also that the motion to set aside was timely, and that there exist issues worthy of adjudication." *Richins*, 817 P.2d at 386 (*Cf. State By & Through Utah State Dep't of Social Servs. v. Musselman*, 667 P.2d 1053, 1055-56 (Utah 1983)); *see also State v. Parker* 872 P.2d 1041, 1044 (Utah Ct. App. 1994).[27] As stated above, Respondent's Motion was timely filed and there exist "issues worthy of adjudication."[28] Accordingly, the threshold showing for relief under Rule 60(b) was met with respect to her claim of mistake and excusable neglect.

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[27] The requirement of "issues worthy of adjudication" seems also to be described at times as a demonstration of a "meritorious defense." *See e.g. Lund*, 11 P.3d at 283. In order to meet this standard, Respondent need not actually prove her defense, instead, because the policy is to prevent the "necessity of treating defenses that are frivolous their face," Respondent is only required to demonstrate through the evidence, that if her defense were proven, it "would preclude total or partial recovery by [Petitioner]. . . ." *Id.* In this case, as the default entry was a result of sanction for failure to produce discovery requests, Respondent has already answered Petitioner's Divorce Complaint, and if the defenses asserted in her Answer were proven, it would deny Petitioner much of the relief he requested (and was later granted by the discovery sanction) in his Divorce Complaint. (*See* R. 36-39.) As such, if necessary, Respondent has also demonstrated that she has a "meritorious defense" to the Divorce Complaint.

[28] Although a default judgment was entered in this matter, this divorce action was a contested proceeding. Respondent filed an answer contesting and denying many of the allegations set forth in Petitioner's Divorce Petition. Respondent contested Petitioner's position on many key issues with regard to the resolution of the parties' divorce action. Some of these vital and contested issues include: custody and child-related issues, alimony, division of the parties' personal and marital assets and division of real property. These issues are almost uniformly addressed in normal divorce proceedings and qualify as "issues worthy of adjudication."

When all of the background information and circumstances, that were provided in Respondent's Motion to Set Aside[29] are reviewed, the trial court abused its discretion and committed reversible error in failing to grant her Motion based on her argument of mistake and excusable neglect.[30] In Petitioner's Memorandum in Support of his Motion to Compel, Petitioner correctly states that Rule 37 of the Utah Rules of Civil Procedure allows the trial court to administer sanctions, including a default judgment, against the party who fails to comply with Discovery Requests. (*See* R. 45-47; Utah R. Civ. P. 37(b)(2)(C), (d).)[31] However, what Petitioner fails to point out is that, although rendering a default judgment is an *option* within the sound discretion of the trial court, nevertheless, ordering a "default judgment is an *unusually harsh* sanction and should be meted out with caution." *Darrington v. Wade* 812 P.2d 452, (Utah Ct. App. 1991) (emphasis added). The trial court's discretion should be "exercised in furtherance of justice and *should incline towards granting relief* in a doubtful case to the end that the party may have a hearing." *Helgesen v. Inyangumia*, 636 P.2d 1079, 1081 (Utah 1981) (citing *Warren v. Dixon Ranch Co. et al.*, 123 Utah 416, 418, 260 P.2d 741 (1953) (emphasis added)).

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[29] *See* R. 153-162; *see also* Statement of Facts to Respondent's Brief.

[30] It should be noted that the trial court made no findings whatsoever regarding Respondent's argument that the Decree of Divorce should be Set Aside on the grounds of mistake or excusable neglect. *See* R. 247-248; *see also* Exhibit "F". For further discussion regarding the trial court's failure to make adequate findings of fact, *see supra*, Part II.

[31] While Respondent concedes that a default judgment was entered pursuant to Rule 37 of the Utah Rules of Civil Procedure as a sanction for her failure to respond to Petitioner's discovery requests, Respondent maintains that his type of entry of default is not pursuant to Rule 104 of the Utah Rules of Civil Procedure and cannot be entered without a hearing. For further discussion *see supra*, Part IC.

Moreover, the Utah Supreme Court has clearly stated its position with respect to the propriety of setting aside a default judgment on the grounds of a reasonable justification or excuse, stating, "it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is reasonable justification or excuse for the defendant's failure to appear, and timely application is made to set it aside." *Helgesen*, 636 P.2d at 1081 (quoting *Mayhew v. Standard Gilsonite Co.*, 14 Utah 2d 52, 54, 376 P.2d 951 (1962)); *see also Olsen v. Cummings*, 565 P.2d 1123, 1124 (Utah 1977).

In this case, Respondent's mistake and neglect are excusable and reasonably justifiable when the surrounding circumstances prior to and leading up to the default judgment are fully disclosed[32] and the trial court abused its discretion in not setting aside the Decree of Divorce upon Respondent's Motion.[33]

In support of her Motion to Set Aside the Decree of Divorce on the grounds of mistake or excusable neglect, the Respondent set forth several viable grounds (all of

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[32] *See supra* pp. 7-20; *see also*, R. 175-183.

[33] Interestingly, Petitioner's Memorandum in Opposition to Respondent Motion to Set Aside (Petitioner's "Memorandum in Opposition") does not even address the majority of the issues raised or arguments presented by Respondent. (*See* R. 219-223.) Instead, Petitioner's Memorandum in Opposition focuses solely on Petitioner's argument that Respondent could not bring a motion to set aside because it is barred by the doctrine of the "law of the case." (*See* R. 219-223.) As throughly explained in Respondent's Reply Memorandum, the doctrine of the "law of the case" is inapplicable in this case and Respondent was fully authorized, pursuant to the Utah Rules of Civil Procedure, in filing her Motion to Set Aside. (*See* R. 236-243.) Why the trial court did not grant Respondent's largely unopposed Motion to Set Aside (or even allow a hearing on the matter), especially when Respondent's argument of a procedural due process violation was completely uncontested and unopposed, is a complete mystery to Respondent (the opposition to Respondent's Motion was limited to Petitioner's argument of the doctrine of the "law of the case" and two affidavits that did not even address all the issues raised or arguments set forth by Respondent (*see* R. 219-223; R. 224-230; R. 231-233).

which were either ignored or simply unaddressed by the trial court in its Ruling[34]). First, Respondent was experiencing, and continues to experience, difficulties because of her physical circumstances. Shortly before she was served with the Discovery Requests, she was involved in a horrible roll-over car crash, causing serious injuries to her left side, hip, leg and neck. These injuries required her to undergo protracted physical therapy.[35] She was required to undergo extensive chiropractic therapy for several months and is still being regularly treated by the chiropractor. During this same time period, she also had two reconstructive surgeries.[36] Right after the accident and the first surgery, Petitioner served Respondent with his Discovery Requests. The timing of the requests was extremely inopportune, and she was required to deal with the difficulties inherent in complying with a discovery demand, while simultaneously devoting a considerable amount of time to her recovery from her accident and surgeries. Moreover, her prior counsel's refusal to respond to her phone calls or requests for help made an already difficult and stressful situation for Respondent seemingly insurmountable.[37]

Second, Respondent has adamantly maintained and has provided a sworn statement that she was unaware of the Motion for Default Judgment and Evidentiary

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[34] *See* Ruling at R. 247-248.

[35] Petitioner never disputes or opposes the nature of Respondent's car accident or the severity of her injuries sustained therein. (*See* R. 224-229.)

[36] Petitioner acknowledges that Respondent was obligated to remove a lump from her breast, but disagrees that the reconstructive surgery was necessary because he characterizes the lump as "small." (*See* R. 227 at ¶ 12.)

[37] For a discussion as to whether Respondent's prior counsel's actions amount to inadequate representation, see *infra* Part V.

Hearing until her present counsel informed her that the Evidentiary Hearing had already taken place.[38] Respondent had numerous conversations with Petitioner prior to the hearing and he never once mentioned the upcoming Evidentiary Hearing.[39]

Third, although Respondent should have obtained another counsel sooner, after her prior counsel unexpectedly terminated his representation (while a discovery request was still pending), she could not afford to pay retainer for another attorney at the time. Moreover, Respondent's financially destitute circumstances were exacerbated by Petitioner's wrongful seizure of almost all of the parties' assets.[40]

Finally, the parties had already agreed to the terms of the stipulation and she had even returned to Petitioner a notarized, signed copy of the stipulation. Respondent made numerous efforts to contact Petitioner in order to finalize the stipulation. Every time Respondent contacted Petioner about the status of the stipulation, Petitioner simply told Respondent he only needed to contact his attorney and sign the stipulation.[41] Prior to the Default and Evidentiary Hearing, Petitioner never informed Respondent that he no longer intended to abide by the terms of the agreed upon stipulation.[42]

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[38] *See* R. 160 at ¶ 44; R. 162 at ¶ 49; R. 181 at ¶ 33; R. 182 at ¶ 35

[39] For a discussion as to whether Petitioner's actions amount to fraud, *see infra* Part IV.

[40] Petitioner admits that he took all of the funds from the parties' accounts after the parties' separation. (*See* R. 226 at ¶ 7.)

[41] Despite the trial court's skepticism regarding Respondent's assertion that the parties' had entered into a stipulation (*see* R. 247-248), Petitioner admits the parties had entertained several stipulations in this matter. (*See* R. 227 at ¶ 13.)

[42] *See* R. 181 at ¶ 34.

In any event, Respondent is not legally trained or well educated and was simply unaware that a failure to respond to Petitioner's Discovery Requests could or would result in a sanction of Default Judgment against her.

While it is true that Respondent could have been more diligent during this proceeding, she was experiencing severe, extenuating circumstances, financial difficulties, communication and representation problems with prior counsel and a failed stipulation. These circumstances were largely uncontested by Petitioner and provide a reasonable justification and excuse for her failure to timely respond to the discovery demands or to the Default and Evidentiary Hearing. Accordingly, Respondent's Motion should be granted.

IV. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN FAILING TO SET ASIDE THE DECREE OF DIVORCE BASED ON RESPONDENT'S ARGUMENT THAT PETITIONER COMMITTED FRAUD OR MISREPRESENTATION AGAINST HER OR THE COURT

The Utah Supreme Court defined fraud as "a false representation of an existing material fact, made knowingly or recklessly for the purpose of inducing reliance thereon, upon which plaintiff reasonably relies to his detriment." *Rawson v. Conover*, 20 P.3d 876, 882 (Utah 2001). Accordingly, in Utah, the elements of fraud are:

> (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge on which to base such a representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980); *see also Maynard v. Wharton*, 912

P.2d 446, 450 (Utah Ct. App. 1996). In the course of obtaining a default Decree of Divorce against the Respondent, Petitioner appears to have committed fraud, not only upon Respondent, but also upon the Court at the Evidentiary Hearing.[43] Respondent submitted credible evidence of that Petitioner had committed fraud with her and upon the trial court.[44]

A. The Trial Court Abused Its Discretion when it Failed to Set Aside the Decree of Divorce When Respondent Submitted Credible Evidence that Petitioner Deliberately Made Fraudulent and False Representations to Respondent Regarding His Willingness to Enter into a Divorce Stipulation in Order to Obtain a Default Judgment.

As detailed in the Statement of Facts included in Respondent's Memorandum in Support of her Motion to Set Aside (*see* R. 7, ¶ 33 - R. 8, ¶ 46),[45] shortly after the June

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[43] It should be noted that the trial court made no findings regarding Respondent's Argument that the Decree of Divorce should be set aside on the grounds of fraud or misrepresentation. *See* R. 247-248; *see also* Exhibit "F". For further discussion regarding the trial court's failure to make adequate findings of fact, *see supra*, Part II. The trial court's sole finding that *might* be considered related to her fraud claims is that the Court found it not credible to believe that Respondent, if she had a valid stipulation, would not simply attend the Evidentiary Hearing and submit the stipulation at that time. *See* R. 247-248.

[44] Much of Respondent's claims regarding fraud were not even controverted by Petitioner in his response to Respondent's Motion to Set Aside. Indeed, Petitioner's response does not even address these claims (or the facts asserted by Respondent) and Petitioner's supporting affidavit agreed to some of the allegations, and failed to even deny several other. *See* R. 226 at ¶¶ 7, 8; R. 227 at ¶¶ 12, 13. Significantly, Petitioner's affidavit does not even deny or attempt to clarify Respondent's assertion that the parties' home is martial property and that she has an equitable interest in it. *See* R. 224-229. Petitioner also does not deny that after the Evidentiary Hearing, he openly mocked and laughed at Respondent, telling her that she was "so f _ _ _ ing stupid!" and that he "just got everything." *See* R. 224-229.

[45] *See also* Statement of Facts in this Brief.

2004 hearing, Petitioner and Respondent agreed to amicably settle the divorce issues.[46] Respondent believed and reasonably relied on Petitioner's representations that he wanted to enter into a stipulation. Settlement terms were agreed upon and a stipulation was prepared by Petitioner's attorney who then sent a copy to Respondent to sign. Petitioner informed Respondent that before the parties could enter into the stipulation, Respondent was required to attend the Divorce Education Class. After Respondent took the Divorce Education Class on August 14, 2004, Respondent immediately sent the signed, notarized copy of the stipulation to Petitioner counsel. Respondent believed that Petitioner would sign the agreed upon stipulation. Respondent called Petitioner regarding the stipulation and each time Petitioner assured her that he intended to sign the stipulation upon receipt from his counsel. Petitioner still had not sent Respondent a signed copy of the stipulation by September 26, 2004, so Respondent called Petitioner again regarding the status of the stipulation. This time Petitioner openly mocked and laughed at Respondent, telling her that she was "so f _ _ _ ing stupid!" and that he "just got everything."[47] After this conversation, Respondent realized, for the first time, that Petitioner had purposefully deceived her, that he did not intend to honor the stipulation that the parties had agreed to, and had obtained an unfair advantage in the divorce proceeding through deceit and subterfuge. After Respondent's conversation with Petitioner, she immediately obtained another attorney to represent her.

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[46] Despite the trial court's incredulity regarding Respondent's assertion that the parties' had entered into a stipulation (*see* R. 247-248), Petitioner admits the parties had entertained several stipulations in this matter. (*See* R. 227 at ¶ 13.)

[47] Petitioner does not deny that this conversation took place or that he made the above statements to Respondent. (*See* R. 224-229.)

In retrospect, it is evident that Petitioner simply engaged in inappropriate stall tactics and feigned interest in settlement in order to obtain a default judgment against the Respondent. Obtaining a default judgment against Respondent, while simultaneously feigning interest in settlement in order to make the Respondent more cooperative and complacent, surely qualifies as dishonest, fraudulent and improper behavior by Petitioner.

Petitioner, through deceit and subterfuge, misled Respondent with promises to sign the agreed-upon stipulation until after a default judgment had been entered and an Evidentiary Hearing held without Respondent's participation. He should not be allowed to reap the benefit of his intentional, fraudulent and improper acts.

B. The Trial Court Abused Its Discretion when it Failed to Set Aside the Decree of Divorce When Respondent Submitted Credible Evidence that Petitioner Deliberately Made Fraudulent Representations to the Court Regarding the Marital Home and Failed to Disclose That the Parties Had Agreed to a Divorce Stipulation.

Respondent discovered, after a review of the Decree of Divorce, the Evidentiary Hearing and the Evidentiary Hearing transcript,[48] that Petitioner intentionally mislead the the trial court with respect to Respondent's equitable interest in the parties' marital home. Petitioner informed the trial court that the home was premarital property. In reasonable reliance on Petitioner's statement, the trial court awarded Petitioner sole ownership of the marital home. Such a representation is inaccurate and made deliberately with the intent to mislead the trial court. Petitioner was fully aware at the time he made the statement to the trial court that it was inaccurate and that a mortgage upon the parties' home in the amount of approximately $110,000 was secured shortly before the parties were married. As a

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[48] *See* R. 192-195; *see also* Exhibit "G".

stay-at-home mother during the parties' 4 ½ year marriage, Respondent helped contribute to the approximately $800.00 per month mortgage obligation.[49] As such, Respondent has been harmed in the amount of her equitable interest in the equity of the marital home that accrued during the parties' marriage.

More insidious and deceitful on the part of Petitioner perhaps, is his complete and utter failure to discuss with or even mention to the trial court that the parties had reached a stipulated agreement with respect to the terms of the divorce and the property distribution. Petitioner had not only verbally agreed to terms of the stipulation, but had had his attorney draft a stipulation for the parties to sign. Respondent signed this stipulation in the presence of a notary and returned it to Petitioner's counsel in the good faith expectation that Petitioner would sign the stipulation and the parties' divorce would be concluded. For Petitioner to knowingly misinform the trial court regarding the status of the parties' home and to fail to disclose to the trial court the parties' stipulation, is a deliberate attempt by Petitioner to perpetrated a fraud upon the trial court. The trial court's failure to set aside the Decree of Divorce on this ground when raised by the Respondent (and not controverted by Petitioner[50]) constitutes an abuse of discretion.

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[49] Despite his assertions to the trial court at the Evidentiary Hearing that the home was premarital property, Petitioner does not deny or attempt to explain in his affidavit why Respondent is incorrect regarding her assertions that the home is marital property and that she is entitled to an equitable interest in the home. (*See* R. 224-229.)

[50] *See* R. 224-229.

V. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN FAILING TO SET ASIDE THE DECREE OF DIVORCE BASED ON RESPONDENT'S ARGUMENT OF RESPONDENT'S PRIOR COUNSEL'S INEFFECTIVE ASSISTANCE

As stated in previously, there are three requirements to obtaining relief under Rule 60(b)(6) of the Utah Rules of Civil Procedure, "[f]irst that the reason be one other than those listed in subdivisions (1) through [(5)]; second, that the reason justif[ies] relief; and third, that the motion be made within a reasonable time." *Laub*, 657 P.2d at 1306-07. This reason is not one contemplated by Rule 60(b)(1)-(5), and Respondent's Motion to Set Aside was timely filed. Rule 60(b)(6) is "sufficiently broad" enough to permit a court to set aside a judgment on the basis of ineffective assistance of counsel. *In Re Interest of A.G.*, 27 P.3d 562, 564 (Utah Ct. App. 2001) (citing *Stewart v. Sullivan,* 506 P.2d 74, 76 (Utah 1973)). Ineffective assistance of counsel is established by showing "counsel's performance was objectively deficient and that counsel's deficient performance prejudiced the case." *Id.* at 565 (citing *State in Interest of E.H. v. A.H.*, 880 P.2d 11, 13 (Utah Ct. App. 1994)).[51]

In this case it seems hardly debatable that Respondent's prior counsel's performance was objectively deficient and that his performance prejudiced her case. Respondent's prior counsel's performance was objectively deficient and harmed the Respondent because he refused to assist Respondent in the timely preparation of her

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[51] It should be noted that the trial court made no findings whatsoever regarding Respondent's argument that the Decree of Divorce should be set aside on the grounds of ineffective assistance of counsel. *See* R. 247-248; *see also* Exhibit "F". For further discussion regarding the trial court's failure to make adequate findings of fact, *see supra*, Part II.

responses to Petitioner's Discovery Requests and the prior counsel's failure to respond to the discovery request, resulted in a sanction of a default judgment against Respondent. Even though Respondent expressed confusion with respect to complying with the discovery requests and even though she attempted to contact him many times, her prior counsel ignored her reasonable requests for assistance.

Moreover, without any notice to Respondent, prior counsel suddenly and inexplicably terminated his representation while the discovery requests were *still pending*. While Respondent's prior counsel filed a Notice of Withdrawal on about April 20, 2004, and Petitioner filed his Motion to Compel on about April 21, 2004,[52] prior counsel did not tell her of his withdrawal or of the Motion to Compel until *she contacted* him again on or about May 11, 2004. Prior counsel's failure to timely respond to Discovery Requests, his failure to communicate or correspond with Respondent, his withdrawal as counsel while a discovery request was still pending, and his failure to timely notify Respondent of his withdrawal, despite his knowledge that a Motion to Compel (which was sent to prior counsel's office) had been filed, were objectively deficient and seriously prejudiced Respondent's interests and the outcome of this case.

CONCLUSION

In this case, the trial court committed reversible error in failing to adequately consider Respondent's claim of a due process violation. Additionally, the trial court abused it discretion, in a number of other way in denying Respondent's Motion to Set

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[52] Thus Respondent's prior counsel avoided, by one day, the necessity of seeking Court permission to withdraw as counsel. *See* Utah R. Civ. P. 74(a) (If a motion is pending, an attorney may not withdraw except upon motion and order of the court.)

Aside, including (1) by failing to set forth adequate findings of fact to support its Ruling; (2) by failing to set aside the Decree of Divorce on the basis of Respondent's arguments of mistake and excusable neglect; (3) by failing to set aside the Decree of Divorce on the basis of Respondent's arguments of fraud against Respondent and against the trial court; and (4) by failing to set aside the Decree of Divorce on the basis of Respondent's arguments of ineffective assistance of counsel.

Petitioner's arguments that the trial court either ordered a shorter notice period, or alternatively, the trial court's error was harmless are both inaccurate and are not supported by fact and law.

Based on the arguments presented above, the trial court's Ruling denying Respondent's Motion to Set Aside is ripe for reversal. Accordingly, Respondent's appeal should be granted and the trial court's Ruling, denying Respondent's Motion to Set Aside the Decree of Divorce, should be reversed.

DATED this 26th day of October, 2005.

WITT MORLEY & ANDERSON, P.C.

C. VAL MORLEY
Attorney for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I mailed, first class, two true and accurate copies of the foregoing **BRIEF OF APPELLANT** , this 26th day of October, 2005 to:

DOUGLAS L. NEELEY
Attorney for Petitioner/Appellee
1st South Main, Suite 205, P.O. Box 7
Manti, UT 84642

Legal Secretary

Tab A

C. Val Morley, Bar No. 6942
WITT MORLEY & ANDERSON, P.C.
306 West Main Street
American Fork, Utah 84003
Telephone: (801) 756-7658
Facsimile: (801) 756-7659

Attorneys Respondent

IN THE SIXTH JUDICIAL DISTRICT COURT
SANPETE COUNTY, STATE OF UTAH

VAN O. PETERSON, **Petitioner,** **vs.** **KORRIN PETERSON,** **Respondent.**	**NOTICE APPEAL** Case No. 034600189 Judge PAUL D. LYMAN

1. Notice is hereby given that Respondent and Appellant, Korrin Peterson, by and through her counsel of record, C. Val Morley of Witt Morley & Anderson, P.C., appeals, pursuant to Utah Code Ann. § 78-2a-3(h), to the Utah Court of Appeals the final Order and Ruling issued by the Honorable Paul D. Lyman denying Respondent's Motion to Set Aside Decree of Divorce and entered in this matter on April 21, 2005.

2. The appeal is taken from the entire Order and Ruling and from the Honorable Paul D. Lyman's failure to address all grounds set forth by Respondent in support of her Motion

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to Set Aside Decree of Divorce, and from the Honorable Paul D. Lyman's failure to set aside the default Decree of Divorce entered in this matter.

DATED this 23 day of May, 2005.

WITT MORLEY & ANDERSON, P.C.

C. VAL MORLEY
Attorney for Respondent

CERTIFICATE OF MAILING

I certify that on this 23 day of May 2005, I caused a true and correct copy of the NOTICE TO APPEAL to be mailed via first class to:

Douglas Neeley
Attorney for Petitioner/Appellee
1st South Main, Suite 205
P.O. Box 7
Manti, UT 84623

LEGAL ASSISTANT

Tab B

Rule 6. Time.

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) *Unaffected by expiration of term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action that has been pending before it.

(d) *Notice of hearings.* Notice of a hearing shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

(e) *Additional time after service by mail.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

(Amended effective November 1, 1997; April 1, 1999; April 1, 2000; November 1, 2001; November 1, 2003; April 1, 2004.)

Tab C

tions.

(a) *Motion for order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a)(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(a)(2) *Motion.*

(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(a)(2)(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(a)(3) *Evasive or incomplete disclosure, answer, or response.* For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(a)(4) *Expenses and sanctions.*

(a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.*

(b)(1) *Sanctions by court in district where deposition is taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b)(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 16(b), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(b)(2)(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(b)(2)(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(b)(2)(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(b)(2)(E) where a party has failed to comply with an order under Rule 35(a), such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the party's attorney or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) *Failure to participate in the framing of a discovery plan.* If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(f) *Failure to disclose.* If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rules 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court may order any other sanction, including payment of reasonable costs and attorney fees, any order permitted under subpart (b)(2)(A), (B) or (C) and informing the jury of the failure to disclose.

(Amended effective Jan. 1, 1987; November 1, 1999; November 1, 2000; April 1, 2002.)

Tab D

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.
(Amended effective April 1, 1998.)

Tab E

Rule 104. Divorce decree upon affidavit.

A party in a divorce case may apply for entry of a decree without a hearing in cases in which the opposing party fails to make a timely appearance after service of process or other appropriate notice, waives notice, stipulates to the withdrawal of the answer, or stipulates to the entry of the decree or entry of default. An affidavit in support of the decree shall accompany the application. The affidavit shall contain evidence sufficient to support necessary findings of fact and a final judgment.
(Added effective November 1, 2003.)

Tab F

DISTRICT COURT, SANPETE COUNTY, UTAH
160 North Main Street, Room 202
P O Box 100
Manti, UT 84642
Telephone: 435-835-2121 Fax: 435-835-2135

Van O. Peterson, Petitioner, vs. Korrin Peterson, Respondent.	**Ruling** Case No. 034600189 Assigned Judge: Paul D. Lyman

The Court has reviewed the Respondent's Motion to Set Aside Decree of Divorce, the Supporting Memorandum; the Memorandum in Opposition, its supporting affidavits; and the Respondent's Reply. The Court has also reviewed the file including the mailing addresses on the relevant documents, along with the Court's Ruling on Respondent's Proposed Findings of Fact & Conclusion of Law and Decree of Divorce.

The primary factual dispute in this matter revolves around whether the Respondent was sent notices regarding the Court's proceedings after the Court's June 4, 2004 scheduling conference. There is no dispute that the Respondent appeared by telephone at that hearing and that she had no counsel. She claims that after that date she received no notices, even though they were all addressed as they were prior to the scheduling conference. This claim is not credible. She also claims that the parties settled the case after the scheduling conference. If the case were really settled, why didn't she simply appear at the evidentiary hearing with the signed

stipulation?

The Court has reviewed the file and is still of the opinion, as originally expressed in its December 7, 2004 Ruling on Respondent's Objection to Petitioner's Proposed Findings of Fact & Conclusion of Law and Decree of Divorce, that the Respondent had adequate notice and chose not to appear and not to have counsel present.

The Court consequently, denies the Respondent's Motion to Set Aside Decree of Divorce.

Dated this 21st day of April, 2005.

STATE OF UTAH
6TH DISTRICT COURT
SANPETE

Paul D. Lyman
District Court Judge

CERTIFICATE OF SERVICE

On April 22, 2005 a copy of the above Ruling was sent to each of the following by the method indicated:

Addressee	Method (M=mail, P=in person, F=Fax)	Addressee	Method (M=mail, P=in person, F=Fax)
C. Val Morley Witt Morley & Anderson PC 110 South Main Street Pleasant Grove, Utah 84062	[M]	Douglas L Neeley Attorney for Petitioner 1st South Main, Suite 205 P.O. Box 7 Manti, Utah 84642	[P]

Denaelson

Tab G

TRANSCRIPT OF EVIDENTIARY HEARING
September 24, 2004

PRESENT: Judge Lyman, Van Peterson and his attorney, Douglas Neeley

JUDGE LYMAN: Okay. The next case is Van Peterson and Korrin Peterson. This is a similar case to what we just did. Is Korrin Peterson here? Near as I can tell, Mr. Moody, she's never filed any response to anything that you've done on this, uh, recent stuff here and a default was entered against her on September 8th. You've asked for a chance to do an evidentiary hearing, do you intend on, do you intend on doing just a proffer, or ...?

MR. NEELEY: Yes, your Honor, the Court — the problem we had was, when we came to the Order to Show Cause, she had recently lost her employment because of the affair she was having with, uh her boss there at Wal-mart and she had moved out of the area. so we didn't, uh, impute income to her at that time until she got a full-time job.

JUDGE LYMAN: Okay.

MR. NEELEY: We still don't know that she has a full time job although he would proffer that he's had numerous conversations with her that, uh, she has bragged to him that she's making a lot more money than she did before. That she does work as a bartender and at a convenience store. What else was it?

MR. PETERSON: And at a daycare

MR. NEELEY: And at a daycare

JUDGE LYMAN: But she had nothing . . . to show that ...?

MR. NEELEY and MR. PETERSON: (talking unintelligible)

MR. NEELEY: She won't – but we asked her to provide all that. So what he would tell the court is that the last time she was fully employed because she was with Wal-mart, she was earning $9.00 an hour. Since the time that, uh, we had the Order to Show Cause, your Honor, Mr. Peterson also testifies that she has had, uh, breast augmentation, uh, done. She also has several tattoos that she's displaying,.so she's had the ability to pay for those. Uh . . .

JUDGE LYMAN: Either that or the boyfriend's paying for them.

MR. NEELEY: Exactly

JUDGE LYMAN: We don't know for sure.

MR. NEELEY: She's actually, your Honor (muffled talking-unintelligible) well, there's been four different guys that have come to his house who have helped exercise visitation, so.

JUDGE LYMAN: I'll grant the relief you've requested. There is one problem in this, I don't have any proof that your client is taking the Divorce Education class.

MR. NEELEY and MR. PETERSON: (unintelligible talking)

MR. NEELEY: Can we then, do the income on her at $9.00 an hour, your Honor?

JUDGE LYMAN: Yes, you can.

MR. NEELEY: Okay.

JUDGE LYMAN: But when's he going to take the Divorce Education?

MR. NEELEY: He'll get that done within the next (muffled client and attorney talking) (2 weeks?)

JUDGE LYMAN: Okay, uh, alright, in this case then, do you want to present any other evidence, $9.00 an hour, his income, you've got verification of somewhere ...?

MR. NEELEY: We do, we do

JUDGE LYMAN: Uh, and $9.00 an hour is fine, that's, uh,

MR. NEELEY: We'd also said that the court ought to do, to make an equitable division of the marital debts. He's taken care of those.

JUDGE LYMAN: Okay.

MR. NEELEY: Debts -- We also ask the court to award the personal property as it has already been divided.

JUDGE LYMAN: As it stands. Is there any real property?

MR. NEELEY: There is real property. He had a home prior to the marriage and, uh,

JUDGE LYMAN: So it's pre-marital property.

MR. NEELEY: Yes.

JUDGE LYMAN: So, she's obviously giving up her claim to it by not appearing here. So...?

MR. NEELEY: Your honor, there are two income tax returns that, uh, we've tried to get her to sign also, I mean income tax checks. We've tried to get her to sign those. She has not, uh, been willing to do that. What do you want to do?

JUDGE LYMAN: Uh, there's not a lot I can do on it.

MR. NEELEY: Can we put on the order that she's ordered to sign those?

JUDGE LYMAN: That's fine, you can do that. How much are they for?

MR. NEELEY: Uh, the federal is for $1,086.00, the state is for $275.00.

JUDGE LYMAN: Are you intending to split them with her?

MR. PETERSON: I offered her a third of it, and she wouldn't do it.

MR. NEELEY: The reason he offered her that, your Honor is because she hasn't – the parties have been separated now for many months. She's not paid any, uh ...?

MR. PETERSON: Ten months.

MR. NEELEY: Ten months.

JUDGE LYMAN: Was she part of though, the information that was submitted on these things? Did you use her income information and his income?

MR. NEELEY: It was a joint tax return.

JUDGE LYMAN: Okay, then I think it-- they just need to be split 50-50.

MR. NEELEY: Okay.

JUDGE LYMAN: And so, split 50-50 and she's ordered to sign them, and he's ordered to give her half the money from them.

MR. PETERSON: What beginning dates should I use for the child support?

JUDGE LYMAN: Uh, when did you file this?

MR. PETERSON: Ten months ago.

JUDGE LYMAN: And you believe she's been employed throughout that time period?

MR. PETERSON: She has.

JUDGE LYMAN: Okay,

MR. PETERSON and MR. NEELEY: (Unintelligible)

JUDGE LYMAN: And you filed this in December? Use that date, December 18th.

MR. PETERSON: For the child support?

JUDGE LYMAN: Yes, sir.

MR. PETERSON. Okay, thank you.

MR. NEELEY: Can we apply....can he have a judgement for what has not been paid since that time? In the Decree?

JUDGE LYMAN: That's – that's fine. Are you going to have ORS collecting this?

MR. NEELEY: Yes.

JUDGE LYMAN: Okay, that should be in there, too.

MR. NEELEY: Alright

JUDGE LYMAN: Alright

MR. NEELEY: Thank you.

JUDGE LYMAN: Thank you.

Tab H

JUL 16 2005

Douglas L. Neeley (Bar # 6290)
1st South Main, Suite 205
P.O. Box 7
Manti, UT 84642
Telephone: (435) 835-5055
Facsimile: (435) 835-5057
Attorney For Plaintiffs

IN THE UTAH COURT OF APPEALS

VAN O. PETERSON, Petitioner/Appellee, vs. KORRIN PETERSON, Respondent/ Appellant	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY DISPOSITION Trial Court No. 034600189 Appellate Court No. 20050472

COMES NOW the Petitioner/Appellee, Van O. Peterson, by and through his attorney Douglas L. Neeley and hereby submits this Memorandum Of Points And Authorities In Opposition To Motion For Summary Disposition. Based on the facts of this case, Appellant Korrin Peterson's Motion for Summary Disposition should be denied.

Argument

Appellant Korrin Peterson argues that the Honorable Trial Judge committed manifest error by denying Appellant's motion for relief under Utah R. Civ. Pro. 60. This is a high burden to meet. Appellant has failed to demonstrate the manifest error required by Rule 10 of the Utah Rules of Appellate Procedure. Manifest error is error that is obvious. State v. Menzies, 845 P.2d 220, 225 (Utah 1992); TDM, Inc. v. Tax Comm'n, 2004 UT App 433. This Court also can defer

ruling on a Motion for Summary Disposition until plenary presentation and consideration of the case. Utah R. App. Pro. 10(f).

Appellant Korrin Peterson's basic argument is that the trial court failed to consider her arguments regarding due process. This is incorrect. In fact, on this issue her Memorandum in Support of her Motion for Summary Disposition is practically a duplicate of her Memorandum in Support of her Motion for Relief under Rule 60 she submitted to the trial court.

Her argument is basically a question of timing—whether the trial court granted her sufficient notice of the Evidentiary Hearing. Rule 69(d) of the Utah Rules of Civil Procedure govern notices for hearings. Five days notice is required, "unless a different period is fixed by these rules or by order of the court."

In this case, the trial court, by denying the Appellant's Rule 60 Motion, which contained the exact same argument, clearly fixed a shorter time for the Hearing. Thus, the rules were followed.

Additionally, even if the trial court committed an error, this error was harmless. Rule 104 of the Utah Rules of Civil Procedure states:

> **Rule 104. Divorce decree upon affidavit.**
>
> A party in a divorce case may apply for entry of a decree without a hearing in cases in which the opposing party fails to make a timely appearance after service of process or other appropriate notice, waives notice, stipulates to the withdrawal of the answer, or stipulates to the entry of the decree or entry of default. An affidavit in support of the decree shall accompany the application. The affidavit shall contain evidence sufficient to support necessary findings of fact and a final judgment.

In this case, the facts are clear—a default certificate had been issued. Thus, there was no need for the hearing at all. In fact, the divorce decree had been issued, based almost exclusively on the Petitioner/Appellee Van Peterson's verified complaint, as this Court can see once the record is assembled.

Since the hearing was not necessary for the divorce decree to be entered, the failure, if any, of the trial court in terms of notice is not fatal. The trial court did not commit manifest error, nor violate any due process rights of the Appellant, Korrin Peterson. She had no right to the hearing at all, and thus notice was not important.

Appellant raises the question of whether the Trial Court made sufficient findings of fact to support its ruling, and suggests that the Trial court did not, and that this is a manifest error. Appellee Van Peterson notes that this question may depend on the record being assembled—especially since trial court's ruling on the Rule 60 Motion in question refers to other findings on this subject. Therefore, the Appellee respectfully urges this Court to defer ruling on this issue until the record is complete and assembled.

Furthermore, the Appellee Van Peterson asks this Court to strike Appellant Korrin Peterson's Exhibit "D", the alleged transcript of the evidentiary hearing. Appellant prepared this "transcript"—not by a licensed court reporter or someone else licensed to prepare transcripts. Nor has Appellant filed a request for transcripts in this case. Thus, Appellee Van Peterson asks this Court to Strike Appellee's Exhibit "D."

Conclusion

Since the Honorable Trial Judge shortened the notice requirement, and since the hearing was not required anyway, the trial court did not commit manifest error when the court denied Appellant Korrin Peterson's Rule 60 motion. Therefore, Appellant Korrin Peterson's Motion for Summary Disposition should be denied. In addition, since the question of whether the Trial Court made sufficient findings, Appellee Van Peterson asks this Court to defer ruling on that portion of this Motion until the Record is assembled. Appellee Van Peterson also asks this Court to strike Appellant's Exhibit "D," as it is not a proper transcript, nor prepared by a person certified to prepare transcripts. Additionally, Appellee, prays for his attorney's fees and costs in order to respond to Appellant's motion.

Douglas L. Neeley
Attorney for Appellee

CERTIFICATE OF SERVICE

I do hereby certify that on this 6 day of July, 2005, I faxed and mailed a true and correct copy of the foregoing Memorandum Of Points And Authorities In Opposition To Motion For Summary Disposition, postage prepaid, to C. Val Morley, Attorney for Respondent, at facsimile: (801)785-0853, 110 South Main Street, Pleasant Grove, Utah, 84062.

SECRETARY